Priyathaseny & Ors v Pegawai Penguatkuasa Agama Jabatan Hal Ehwal Agama Islam Perak & Ors

HIGH COURT (IPOH) — ORIGINATING SUMMONS NO 24–1041 OF 2001
ABDULL HAMID EMBONG J
24 MARCH 2003

Constitutional Law *— Federal and state law — Matters of Islamic law — Renunciation of Islam — Whether subject matter falls within the jurisdiction of the Syariah Court — Whether civil court ousted from dealing with matter*

The first plaintiff, though ethnically a Malay and born a Muslim, renounced the religion of Islam about five years ago, and adopted Hinduism as her religion. She changed her name to a Hindu name, and married the second plaintiff, an ethnic Indian and a lifelong Hindu, and they have two infant children, the third and fourth plaintiffs. After the birth of her elder child and while carrying her second, the first plaintiff was arrested, charged for deriding the religion of Islam (for the actions she took to leave Islam) and for cohabitation outside of lawful Muslim wedlock with the second plaintiff until a child was born (to wit, the third plaintiff). The first plaintiff pleaded guilty, and was convicted and fined. The first plaintiff sought declarations from the court under the Federal Constitution that her continued treatment as a Muslim, and the criminal sanctions imposed or threatened to be imposed against her despite the fact that she no longer professed the religion of Islam, was unconstitutional. The second plaintiff went through a formal conversion to Islam that he said was done under a state of duress as he was advised that his wife would go to jail unless he went through the formal conversion to Islam. However, the second plaintiff professed Hinduism, and had never practised the rites and rituals of Islam. The second plaintiff also sought declaratory relief that he too was not subjected to Islamic law, as he did not profess the religion of Islam. The first and second plaintiffs had also decided for the third and fourth infant plaintiffs that their religion was Hinduism. At the outset, the defendants raised a preliminary objection on the question of this court's jurisdiction to hear this matter.

Held:

This court was not seized with the jurisdiction to determine this matter. Although there were various declarations sought for by the plaintiffs including one on the interpretation of the word 'profess', the central and substantive issue was whether the first plaintiff remained a Muslim despite her so-called renunciation of the Islamic faith and professing now, the Hindu faith and practice. Pegged to this was also the issue of whether the second plaintiff, remained a Muslim in spite of the allegation that he was coerced into converting. This issue was the core subject matter of this application in spite of the various other

declarations sought for. These matters were quite clearly matters that fall within the jurisdiction of the Syariah Court. The jurisdiction of this court was ousted from determining the merits of this application (see p 308F–H); *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 followed.

[Bahasa Malaysia summary

Plaintif pertama, walaupun mengikut keturunan adalah seorang Melayu dan dilahirkan sebagai seorang Muslim, telah meninggalkan agama Islam lebih kurang lima tahun yang lalu, dan menerima agama Hindu sebagai agama beliau. Beliau telah menukar namanya kepada nama Hindu, dan berkahwin dengan plaintif kedua, seorang yang berketurunan India dan merupakan seorang penganut agama Hindu sepanjang hayatnya, dan mereka mempunyai dua anak yang masih budak, plaintif-plaintif ketiga dan keempat. Selepas kelahiran anak beliau yang tua dan ketika mengandungkan anak yang kedua, plaintif pertama telah ditahan, dituduh memperkecil-kecilkan agama Islam (kerana tindakan yang diambil oleh beliau untuk meninggalkan agama Islam) dan kerana bersedudukan di luar undang-undang nikah Islam yang sah dengan plaintif kedua sehingga melahirkan seorang anak (iaitu, plaintif ketiga). Plaintif pertama telah mengaku bersalah, dan telah disabitkan dan didenda. Plaintif pertama kini memohon pengisytiharan dari mahkamah di bawah Perlembagaan Persekutuan bahawa layanan berterusan terhadap beliau sebagai seorang Muslim, dan hukuman jenayah yang dikenakan atau yang diugut untuk dikenakan terhadap beliau meskipun pada hakikatnya beliau tidak lagi memeluk agama Islam, adalah tidak berperlembagaan. Plaintif kedua telah menjalani penukaran agama secara rasmi kepada agama Islam yang mana beliau menyatakan telah dilakukan di bawah keadaan terpaksa kerana beliau telah dinasihatkan bahawa isteri beliau akan dipenjarakan melainkan beliau menjalani penukaran agama secara rasmi kepada agama Islam. Walau bagaimanapun, plaintif kedua menganut agama Hindu dan tidak pernah mengamalkan adat istiadat dan upacara agama Islam. Plaintif kedua juga memohon pengisytiharan relif yang beliau juga tidak tertakluk kepada undang-undang Islam, kerana beliau tidak menganut agama Islam. Plaintif-plaintif pertama dan kedua telah juga membuat keputusan untuk plaintif-plaintif ketiga dan keempat yang masih budak bahawa agama mereka adalah agama Hindu. Defendan-defendan telah membangkitkan bantahan awal atas persoalan bidang kuasa mahkamah ini untuk mendengar perkara ini.

Diputuskan:

Mahkamah ini tidak ada bidang kuasa untuk menentukan perkara ini. Meskipun terdapat pelbagai pengisytiharan yang dipohon oleh plaintif-plaintif termasuk pengisytiharan mengenai pentafsiran perkataan 'menganut', isu yang terpenting dan substantif adalah

sama ada plaintif pertama kekal sebagai seorang Muslim meskipun beliau telah melepaskan agama Islam yang dikatakan dan kini menganut, agama dan amalan Hindu. Bersampingan dengan ini adalah juga isu sama ada plaintif kedua, kekal sebagai seorang Muslim meskipun mendakwa bahawa beliau telah dipaksa untuk menukar agamanya. Isu ini adalah teras hal-perkara permohonan ini meskipun terdapatnya pelbagai pengisytiharan lain yang dipohon. Perkara-perkara ini adalah jelas merupakan perkara yang terlingkung di dalam bidang kuasa Mahkamah Syariah. Bidang kuasa mahkamah ini telah disingkir daripada menentukan merit-merit permohonan ini (lihat ms 308F–H); *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 diikut.

Notes

For cases on matters of Islamic law, see 3 *Mallall's Digest* (4th Ed, 2000 Reissue) paras 1491–1492.

Cases referred to

Abdul Shaik bin Md Ibrahim & Anor v Hussein Ibrahim & Ors [1999] 5 MLJ 618 (refd)

Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam & Anor [1992] 1 MLJ 1 (refd)

Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman dan satu yang lain [1992] 2 MLJ 244 (refd)

Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib [1992] 2 MLJ 793 (refd)

Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor [1999] 1 MLJ 489 (folld)

Legislation referred to

Administration of Islamic Law Enactment 1992 of Perak ss 13, 104

Enakmen Jenayah (Syariah) 1992 s 13

Federal Constitution arts 3, 4(5), 5, 8, 11(1), (2), 12(3), 121(1A), 153(1), 160, Schedule 9, Part IX

K Shanmuga (*Kanesalingam & Co*) for the plaintiffs

Jazamuddin Ahmad Nawawi (Penolong Penasihat Undang-Undang Negeri Perak) for the first and second defendants.

Siti Malinda bte Hj Kamaludin (*Kamaluddin Maamor & Co*) for the third defendant.

Dato' Abdul Aziz Rahim (Senior Federal Counsel) (Attorney General's Chambers) for the fourth defendant.

Ramdas Tikamdas (Siva Ram & Associates) for the fifth defendant.

Abdull Hamid Embong J: The plaintiffs are seeking for various declarations which include, inter alia:

A (i) that the definition of the word 'Muslim' in the Administration of Islamic Law Enactment 1992 of Perak ('Enactment 2/92') is repugnant to art 11(1) read with art 160 of the Federal Constitution and is therefore null and void;

(ii) that no permission or decision from the Syariah Court is necessary for the first plaintiff to profess the religion of her choice since such requirement is ultra vires art 11 of the Federal Constitution;

(iii) that the first plaintiff is no longer a Muslim since she professes herself to be a Hindu and practises that faith;

(iv) that the first plaintiff is no longer a Muslim in view of her conviction for apostasy and that she had paid the fine imposed by the Teluk Intan Syariah Court;

(v) that the first and second plaintiffs should not be subjected to any arrest or detention if they chose to profess and practise a religion of their choice pursuant to their fundamental liberties under the Federal Constitution;

(vi) that the plaintiffs should not be compelled or required to undergo any form of education training or initiation of the Islamic faith and these would be contrary to arts 3, 4(5), 5, 8, 11(1), (2), 12(3), 153(1) and 160 and Schedule 9 of the Federal Constitution,

(vii) that the conversion of the second plaintiff to Islam was made under coercion and thus is null and void.

(viii) that the first plaintiff be at liberty to use her chosen Hindu name of Priyathaseny in place of her given former name of Zuraidah bte Hassan,

(ix) that the prohibition on the first plaintiff to marry the second plaintiff while she was a Muslim is ultra vires art 5 of the Federal Constitution.

The brief facts and summary of reliefs sought are not in dispute, may be extracted from the following summary set out in the written submission of learned counsel for the plaintiffs, for which this court is most grateful. They are:

> 5 The first plaintiff, though ethnically a Malay and born a Muslim, renounced the religion of Islam about 5 years ago, and adopted Hinduism as her religion. She changed her name to a Hindu name, and married the second plaintiff, an ethnic Indian and a lifelong Hindu, and they have two infant children, the third and fourth plaintiffs.
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> 6 After the birth of her elder child and while carrying her second, the first plaintiff was arrested, charged for deriding the religion of Islam (for the actions she took to leave Islam) and for cohabitation outside of lawful Muslim wedlock with the second plaintiff until a child was born (to wit, the third plaintiff). The first plaintiff, on the advice of her *Peguam Syarie* pleaded guilty, and was convicted and fined RM5,000. She spent a total of three nights in detention — on remand prior to her being released on bail, and in a detention cell pending payment of her fine.
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> 7 The first plaintiff now seeks declarations under the Federal Constitution that her continued treatment as a Muslim, and the criminal sanctions

imposed or threatened to be imposed against her despite the fact that she no longer professes the religion of Islam, is unconstitutional. A

8 The second plaintiff went through a formal conversion to Islam which he says was done under a state of duress as he was advised that his wife would go to jail unless he went through the formal conversion to Islam. However, the second plaintiff professes Hinduism, and has never practised the rites and rituals of Islam. B

9 The second plaintiff also seeks declaratory relief that he too is not subjected to Islamic law as he does not profess the religion of Islam. The first and second plaintiffs have also decided for the third and fourth infant plaintiffs that their religion is Hinduism.

At the outset of the hearing, learned counsels for the first to fourth defendants intimated that they are raising a preliminary objection on the question of this court's jurisdiction to hear this matter which I allowed to be argued first. This objection is premised on the argument that since the central issue to be adjudicated is the question of apostasy of the first plaintiff, a matter that could only be determined by the Syariah Court, this court therefore is not seized with the jurisdiction to hear this application. C D

Learned senior federal counsel, Dato' Abdul Aziz bin Abdul Rahim for the first and second defendants submitted that the crux of this application is the declaration sought for in prayer 5 viz whether the first plaintiff is still a Muslim. The other prayers sought for although they may well be within this court's jurisdiction to hear and determine are, in his view, merely peripherals and could not on their own be considered without determination of this central question. Dato' Abdul Aziz Abdul Rahim relied on two decisions of the apex court in *Soon Singh v Pertubuhan Kebajikan Islam Malaysia (PERKIM) Kedah & Anor* [1999] 1 MLJ 489 and *Mohamed Habibullah bin Mahmood v Faridah bte Dato Talib* [1992] 2 MLJ 793 to support his argument that the jurisdiction of this court is now ousted if the matter for determination is one exclusively within the jurisdiction of the Syariah Court under the relevant State enactment enacted pursuant to Schedule 9 of the Federal Constitution. E F

Reference was made to s 13 of the Administration of Islamic Law Enactment, Perak which provides that apostasy committed by a Muslim is an offence punishable with either a RM2,000 fine or imprisonment for a term of up to two years. Reference was also made to Part IX of that Enactment which provides for the mode and procedure of embracing Islam and the requirement for registration for such a conversion. G

The learned federal counsel for the third defendant, Encik Jazamuddin in supporting the abovementioned objection also referred to the decision in *Abdul Shaik bin Md Ibrahim & Anor v Hussein Ibrahim & Ors* [1999] 5 MLJ 618 wherein Abdul Hamid Mohamad J had considered the Federal Court decision in *Soon Singh* and had opined that the test suggested by the apex court is one of 'subject matter test' as found in the following passage of the Federal Court's judgment (at pp 502–503): H I

> Whilst we agree with the approach adopted by Abdul Hamid J following *Habibullah*, that when there is a challenge to jurisdiction the correct approach

A is to look at the State enactments to see whether or not the syariah courts have been expressly conferred jurisdiction on a given matter, with respect, we do not agree with his Lordship's conclusion that since the Penang Enactment did not expressly confer jurisdiction on the syariah court over the matter raised, there was no impediment for the civil court to hear and dispose of the matter.

B The learned judge was of the view that it does not matter what was sought for in the declarations prayed for. The court has to therefore scrutinise what was the subject matter at hand in order to determine whether it has the jurisdiction to hear the application.

For the plaintiffs, learned counsel, Mr K Shanmuga submitted that the declarations sought are constitutional in nature and especially calls for the C interpretation of the phrase 'the right to profess and practise his religion' as found in art 11 of the Federal Constitution. He argued that prayer 5 is not the main thrust of this application which actually is seeking for a declaration that Enactment 2/92 is ultra vires the Federal Constitution. He also submitted that the provision regarding apostasy is also in contravention of art 5 of the Federal Constitution. He further submitted that the first plaintiff D had professed the religion of her choice, ie Hinduism since 1997 when she married the second plaintiff, and had chosen to change her given name to that of Priyathaseny, the name she now uses. Since the issue at hand is a constitutional one, learned counsel submitted that it would not be right for the Syariah Court to determine this application. Further, to remit this E matter to that court would put the plaintiffs in jeopardy of facing further criminal charges.

Learned counsel for the fifth defendant, Mr Ramdas Tikamdas did not support the preliminary objection raised by the other defendants but did not advance any argument against it.

F Clause (1A) of art 121 of the Federal Constitution provides that the High Courts shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court thus ensuring no conflict in jurisdiction. What this court needs to now determine is whether the matter at hand is within the jurisdiction of the Syariah Court. If the answer to this question is in the affirmative then clearly art 121(1A) prohibits the hearing of the merits G of this application by this court. The preliminary objection is therefore well taken and requires determination lest this court falls into an error of jurisdiction in adjudicating this application (see *Dalip Kaur v Pegawai Polis Daerah Bukit Mertajam & Anor* [1992] 1 MLJ 1 and *Majlis Agama Islam Pulau Pinang lwn Isa Abdul Rahman dan satu yang lain* [1992] 2 MLJ 244).

H Learned counsel for the plaintiffs forwarded a two pronged argument namely, that since the plaintiffs do not profess the Islamic faith the Syariah Court therefore has no jurisdiction to determine their status. Secondly, he argued that this application requires a consideration of the constitutional validity of the relevant State enactments and must therefore be within the jurisdiction of the civil court. Learned counsel also said this:

I To send this case to Syariah Court would be to give the Syariah Court powers over persons who do not profess Islam in Malaysia — a country comprising people professing and practising so many different religions. This cannot be

right, particularly as the Federal Constitution expressly provides that the Syariah Courts shall have jurisdiction 'only' over persons 'professing the religion of Islam.

In my view the central issues to be determined are as found in the declarations sought under prayers 5 and 15 which are now reproduced. They are:

> 5 The first plaintiff is no longer a Muslim because she professes herself to be a Hindu and practises the Hindu religion and way of life by choice.
>
> 15 The certificate of conversion to Islam number 13104 of the second plaintiff dated 30 October 2000 issued by the third defendant is null and void and of no effect as the second plaintiff went through a form of conversion to Islam under duress in that the second plaintiff at all material times was terrified because the second plaintiff was threatened that his wife, the first plaintiff, would be imprisoned if the second plaintiff did not go through the process of converting to Islam.

These matters are quite clearly matters that fall within the jurisdiction of the Syariah Court. The issue of apostasy committed by the first plaintiff is governed by s 13 of the Enakmen Jenayah (Syariah) 1992 which states:

> Any Muslim who wilfully either by his action or words or in any manner claims to denounce the religion of Islam or declares himself to be a non-Muslim is guilty of an offence of deriding the religion of Islam and shall on conviction be liable to a fine not exceeding three thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Further, the matter of conversion of a person to Islam is governed under Part IX of the Administration of Islamic Law Enactment 1992 and is also a matter within the jurisdiction of the Syariah Court to determine any question on whether a person has or has not embraced Islam (see s 104).

In my considered view, the preliminary objection is sound and I agree with the views expressed by learned counsels for the first to fourth defendants that this court is not seized with the jurisdiction to determine this matter. Although there are various declarations sought for by the plaintiffs including, as submitted by their learned counsel, one on the interpretation of the word 'profess', it is this court's finding that the central and substantive issue is whether the first plaintiff remains a Muslim despite her so-called renunciation of the Islamic faith and professing now, the Hindu faith and practice. Pegged to this is also the issue of whether her husband, the second plaintiff, remains a Muslim in spite of the allegation that he was coerced into converting. This issue is the core subject matter of this application in spite of the various other declarations sought for. These are, as described by learned senior federal counsel, Dato' Abdul Aziz and with whom this court agrees, 'peripheral issues' that should not cloud the focal issue. Having said that, I am now guided by and bound by the pronouncement of our apex court in *Soon Singh* that the jurisdiction of this court is now ousted from determining the merits of this application. This central issue is clearly out of the bounds of jurisdiction of the civil court as it is clearly a matter that can only be determined by the Syariah authorities. *Soon Singh* was analyzed in detail by my learned brother, Abdul Hamid

A Mohamad J who came to the following conclusion and with which I fully concur and adopt. He concluded (at p 624):

> My understanding of the judgment is as follows:
>
> (a) when there is a challenge to the jurisdiction of the Syariah Court (or for that matter of this court vis-a-vis the jurisdiction of the Syariah Court) the
B court should look at the State enactments, not the State List to see whether Syariah Court has jurisdiction over the matter and if it has, then, this court has no jurisdiction over the matter;
>
> (b) however in the case of conversion out of Islam, since the relevant Penang State Enactment (indeed the Enactments of other States) contains provisions regarding conversion into Islam, the jurisdiction over
C conversion out of Islam, may be inferred.

For these reasons, the preliminary objection is upheld and this application is hereby dismissed with costs.

Order accordingly.

D Reported by Peter Ling

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